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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. WENDELL ROWE, Defendant and Appellant.	B238752 (Los Angeles County Super. Ct. No. KA093812)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed as modified.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Yun K. Lee and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Wendell Rowe was convicted, following a jury trial, of one count of making criminal threats in violation of Penal Code section 422,[1] one count of corporal injury to a cohabitant in violation of section 273.5, subdivision (a) and one count of kidnapping in violation of section 207, subdivision (a). The trial court found true the allegations that appellant had suffered two prior serious felony convictions within the meaning of section 667, subdivision (a) and the "Three Strikes" law (§§ 667, subds. (b)-(i) & 1170.12), and had served prison terms for those convictions within the meaning of section 667.5, subdivision (b). The trial court sentenced appellant to 25 years to life on the kidnapping conviction, pursuant to the Three Strikes law, plus two consecutive 5-year enhancement terms pursuant to section 667, subdivision (a) plus a 1-year term pursuant to section 667.5, for a total term of 36 years to life in state prison. We affirm the judgment of conviction.

Facts

From October 2010 to February 2011, appellant and Jane Doe lived together as roommates, and shared a bed. At one time, they had had a sexual relationship, but on February 11, 2011, they were sharing a room in a house for financial reasons only.

On February 11, Jane was home with appellant. She received a picture text message on her cell phone from appellant's daughter's mother, Beverly. Jane and Beverly were friends. Appellant asked to see the message, but Jane refused. Appellant asked how he could know that the message was from Beverly if Jane would not let him see it. An argument ensued. Eventually, appellant said that he was going to call Beverly to see if she sent the message. Jane said, "Whatever."

About four or five hours later, about 7:30 p.m., appellant brought up the text message again. Jane said that she did not want to talk about it, and was going to the Arco to buy cigarettes.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Jane left the house and began walking to Arco. She noticed appellant driving his car down the same street. He stopped the car at a stop light, got out and blocked Jane. Appellant told her to get in the car and he would take her to the Arco to buy cigarettes. Jane said that she wanted to walk. Appellant got mad and began yelling and "cussing." He said, "Bitch, I told you I'm tired of your motherfucking ass. Get your ass in the car. I'm going to kill you today." Jane told appellant to move. He grabbed her, dragged her to the car and forced her into the front passenger seat.

Jane was afraid. She had never seen appellant this angry before, and feared he had "snapped" and would try to kill her. She did not think that appellant had been drinking or taking any medicine.

As he drove, appellant kept repeating his threat to kill Jane. Jane tried to get out of the car, but appellant kept grabbing her and hitting her. Appellant drove into a dead-end alley. He said, "I should run this car into the building and kill both of us." He got out of the car, came around to the passenger side of the car, pulled Jane out and started choking her. She stabbed at him with a pen. Appellant slammed her against the car and hit her. He then threw her back into the car and told her that the next time she saw her children would be at her funeral. Appellant then resumed driving.

As the car went near a police station, Jane tried to jump out. She was hampered by her seat belt. Appellant grabbed the hood of her jacket. The lower part of Jane's body was outside the car, however. Appellant continued to drive, dragging Jane's body on the ground.

Appellant stopped the car to pull Jane back inside. Jane's escape attempt had been observed by Michael Doherty and his wife, who were driving in the area. Doherty drove his car next to appellant's and told appellant to pull over and stop. Appellant eventually stopped the car, and Doherty got out of his car and went to appellant's car.

Jane broke free and ran toward the police station, yelling, "He's trying to kill me." Appellant got out of his car and looked at Doherty, who felt threatened. Doherty punched appellant in the face. Appellant said, "Oh, shit. Let me get my gun." Doherty ran to his car and drove away.

Doherty eventually reached the police station. There, he saw Jane. She pointed at him and identified him as the man who had helped her.

The dragging portion of the incident was also observed by Sebastian Popovic, a pedestrian in the area.

Jane was taken to the hospital, where she was treated for injuries to her neck, chest and knees.

Discussion

1. Motion for continuance

Appellant contends that the trial court abused its discretion in denying his motion for a continuance, made pursuant to section 1050, and that this error violated his state and federal constitutional rights to due process. Appellant's counsel sought the continuance to investigate "new information" which she had just discovered.

A continuance in a criminal case "shall be granted only upon a showing of good cause." (§ 1050, subd. (e); see also *People v. Doolin* (2009) 45 Cal.4th 390, 450.) A trial court has broad discretion to determine whether good cause exists to grant a continuance. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) "The court must consider ""not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion."" [Citation.]" (*People v. Doolin, supra,* 45 Cal.4th at p. 450.)

"While a showing of good cause requires that both counsel and the defendant demonstrate they have prepared for trial with due diligence [citation], the trial court may not exercise its discretion 'so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.' [Citation.]" (*People v. Doolin, supra*, 45 Cal.4th at p. 450.) "A reviewing court considers the circumstances of each case and the reasons presented for the request to determine whether a trial court's denial of a continuance was so arbitrary as to deny due process. [Citation.] Absent a showing of an abuse of discretion and prejudice, the trial court's denial does not warrant reversal. [Citation.]" (*Ibid*.)

Here, appellant's trial counsel, who worked for the public defender's office, filed a motion to continue on July 29, 2011, three days before the scheduled trial date of August 1. The public defender's office had had appellant's case since late April. The preliminary hearing in this matter was held on May 5.

Counsel explained in her declaration that she had just received material from the archived case file for appellant's 1987 prior conviction in case number A707994. The probation report showed that appellant "suffered from serious mental health problems including schizophrenia and had been hospitalized and medicated several times throughout the years" and suffered from "cognitive deficits" as well. She asked for a continuance to gather the mental health records referenced in the probation report and to have appellant "evaluated to determine the extent of his illness and to what extent, if any, this . . . illness bears upon his mental state at the time of the crime."

At the hearing on the motion, appellant's counsel stated that she believed that her motion was pretty specific and that the attachment backed up the motion. When the court pointed out the information in the motion came from 1987, counsel argued that "schizophrenia doesn't go away." She noted that appellant was on medication in 1987 but "[a]t this time I don't know if he's on his medication."

The trial court denied the motion. The court stated: "Your office has had this case since April 25th. You've had two different attorneys on this matter. You have done the preliminary hearing. It's 60 of 60 for trial today. You filed a 1050 with some background information from a 1987 probation and sentencing report. Based upon that and your present argument, I do not find good cause to continue this matter at this time. Your 1050 is denied."

Even assuming for the sake of argument that the trial court abused its discretion in denying the motion for a continuance, there is no showing of prejudice whatsoever on the record before us. (See *People v. Doolin, supra*, 45 Cal.4th at p. 450; *Chapman v. California* (1967) 386 U.S. 18, 24.)

As the trial court pointed out, counsel was relying on a probation report which was almost 25 years old. It showed, at most, that appellant was diagnosed with schizophrenia

in 1987. Appellant was investigated, arrested and jailed in this matter in 2011. There is nothing in the record to show that police or jail officials suspected mental illness. There is nothing in the record indicating that appellant had any difficulties in pre-trial court proceedings. Counsel apparently saw nothing in appellant's behavior suggesting mental illness, since she represented to the court that "I could not have anticipated finding this information at the last minute."

Appellant argues on appeal, as he did in the trial court, that schizophrenia does not go away. Appellant may well be correct, but there is no evidence in the record to suggest that appellant's schizophrenia played any role in his actions on the day of the offenses.

Appellant argues on appeal that the victim's testimony is evidence that schizophrenia played a role in his behavior on the day of the crime. He points out that the victim testified that she had never seen appellant act this way before and he had apparently "snapped." Appellant speculates that he could have been on medication before the offenses and then stopped taking the medication on the day of the offenses, resulting in his unusual behavior that day. This theory was not advanced in the trial court, and there is no evidence to support appellant's speculation about medication.[2] Further, in light of the facts actually presented in the trial court, the victim's testimony could equally be understood as showing that appellant did not have a long-standing mental illness. Appellant apparently behaved perfectly normally for a period of time, and his violent behavior was out of the norm.

Appellant also points out that the probation report indicates that he has cognitive deficits. There is no evidence of such deficits in appellant's behavior at the time of trial. At the hearing on his *Marsden* motion, for example, the court stated that if appellant took a plea agreement, he would have to do 80 percent of the time. Appellant said that he thought it would be 85 percent. Both the court and counsel agreed that the requirement could be 85 percent on some of the counts against appellant.

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[2] If appellant was on medication, he was aware of that fact, and could have informed his counsel. This was not information which could only be found in a 25-year-old file.

Finally, the only prejudice identified by appellant is the abstract possibility that an examination by a mental health professional might have given him a basis for a plea of not guilty by reason of insanity. As appellant acknowledges, such a plea requires a showing that at the time the offenses were committed, appellant was "incapable [either] of knowing or understanding the nature of his act or of distinguishing right from wrong." (*People v. Hernandez* (2000) 22 Cal.4th 512, 520.) This incapacity must be due to "a defect of reason, from disease of the mind." (*People v. Skinner* (1985) 39 Cal.3d 765, 773, 777.) If appellant made a claim to counsel that he did not believe what he did was morally wrong, or he did not remember his acts, counsel should have investigated his mental health sooner. If he did not make such claims to his counsel, there is no reason to believe that he would make them to a mental health professional. Thus, counsel did not show that there was a reasonable chance that a continuance would have resulted in support for an insanity plea.

2. Presentence custody credits

Appellant contends that the trial court incorrectly set his presentence custody credits at 271 days of actual custody, plus 40 days of conduct credit for a total of 311 days. He contends that he had 273 days of actual custody, for a total of 313 days. Respondent agrees. We agree as well.

The probation report shows that appellant was arrested on April 21, 2011. He was sentenced on January 18, 2012. That amounts to 273 days. There is no change in the number of conduct credit days.

The abstract of judgment must be corrected to show these figures. (§ 2933.1; see generally *People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428 & fn. 8; *People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1139.)

3. Section 667.5 enhancements

Respondent contends that the trial court found true two section 667.5 prison term allegations, but only imposed one at sentencing, and that this matter must be remanded to the trial court for resentencing. We do not agree.

Appellant's conviction in case number MA023503 involved a serious felony within the meaning of section 667, subdivision (a). Appellant also served a prison term for that conviction within the meaning of section 667.5. In such situations, the trial court may impose only the section 667, subdivision (a) five-year enhancement term. The section 667.5 one-year enhancement term may not be imposed. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1144-1146, 1150, 1153.) Thus, the trial court acted correctly.

To avoid any future misunderstanding, the section 667.5, subdivision (b) allegation as to case number MA023503 is ordered stricken.

Disposition

The judgment is corrected to reflect that appellant has 273 days of actual custody and 40 days of conduct credit for a total of 313 days of custody credit. The section 667.5, subdivision (b) allegation in case number MA023503 is ordered stricken. The clerk of the superior court is instructed to prepare an amended abstract of judgment reflecting these changes and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

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ARMSTRONG, J.

We concur:

TURNER, P. J. MOSK, J.